Supreme Court, U.S.
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No. 10-364

In The
Supreme Court of the United States

TINA M. RANDOLPH,

Petitioner,

v.

DIMENSION FILMS; MIRAMAX FILM CORP.; SONY PICTURES ENTERTAINMENT, INC.; BUENA VISTA HOME ENTERTAINMENT, INC.; COLUMBIA PICTURES; THE WALT DISNEY CO.; TROUBLEMAKER STUDIOS; ROBERT RODRIGUEZ; R.M. RODRIGUEZ, by parent and next friend, Robert Rodriguez; ELIZABETH AVELLAN; JOHN DOE(S) 1-999,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 12(b)(6) was properly applied to dismiss a claim for copyright infringement when the only asserted ground for dismissal was that the copyrighted work and the allegedly infringing work are not substantially similar.

2. Whether the Fifth Circuit erred in affirming the district court's grant of Respondents' motion to dismiss Petitioner's copyright-infringement claim under Federal Rule of Civil Procedure 12(b)(6) based on the district court's reliance on the differences between the two works rather than their similarities.

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The opinion of the Fifth Circuit Court of Appeals was not published. (App. 1-2) The District Court's opinion and order granting Respondents' motion to dismiss is reported at 630 F. Supp. 2d 741 (S.D. Tex. 2009). The District Court's opinion and order denying Petitioner's motion for reconsideration is reported at 634 F. Supp. 2d 779 (S.D. Tex. 2009)

JURISDICTION

The Fifth Circuit rendered its judgment and issued an opinion on June 16, 2010. (App. 1-2) This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on writ of certiorari.

RULE AND STATUTORY PROVISIONS INVOLVED

17 U.S.C. § 106 provides as follows:

> Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;

> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 501(b) provides in relevant part as follows: "The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it."

Federal Rule of Civil Procedure 12(b) provides in relevant part as follows: "[A] party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted . . . ."

STATEMENT OF THE CASE

Tina Randolph is the author of "Mystic Deja: Maze of Existence," a book published in 2002 (the "Book"). (USCA5 13) Randolph registered her work with the United States Copyright Office and obtained U.S. Copyright registrations for the Book, as well as for artwork in the Book and on a website associated with the Book. (USCA5 13, 21-23)

Respondents, Dimension Films *et al.*, are the writers, producers, and distributors of a motion picture entitled "The Adventures of Sharkboy and Lavagirl in 3-D" (the "Movie"). (USCA5 13-14) Randolph filed the underlying lawsuit in June 2008, alleging that the Movie infringes on her copyrighted works, including the Book, under 17 U.S.C. § 106. (USCA5 10-17)[1]

Respondents filed a Rule 12(b)(6) motion to dismiss in December 2008. (USCA5 75-105) The sole basis for dismissal asserted in Respondents' motion is that the Movie is not "substantially similar" to the protectable elements in the Book. (*See* USCA5 81-86) Randolph filed a response challenging, among other things, the district court's ability to dismiss Randolph's claims under Rule 12(b)(6). (*See* USCA5

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[1] Randolph's original complaint included claims for violations of the Lanham Act, 15 U.S.C. § 1125(a), and the Texas Deceptive Trade Practices – Consumer Protection Act, TEX. BUS. & COM. CODE §§ 17.41-.63. (*See* USCA5 14-16) Randolph does not challenge the dismissal of either of these claims.

122-135) On February 17, 2009, the district court granted the motion and dismissed Randolph's claims with prejudice and without providing her an opportunity to replead. (USCA5 161-175; App. 3-21) The same day, the court entered a Final Judgment dismissing Randolph's lawsuit. (USCA5 175)

Randolph timely filed a motion for reconsideration and to alter or amend the judgment. (USCA5 206-216) Among other things, Randolph argued that (1) dismissal of Randolph's complaint based on the alleged absence of substantial similarity was not appropriate under Rule 12(b)(6) and (2) the district court erroneously focused on the differences between the two works rather than the similarities. (*Id.*) Along with the motion, Randolph filed an affidavit to which she attached a DVD containing a multimedia PowerPoint presentation and a written document detailing the similarities between the Book and the Movie. (USCA5 217-260) The district court entered a Memorandum and Order denying Randolph's motion. (USCA5 324-356; App. 22-64)

Randolph timely filed a Notice of Appeal. (USCA5 357-358) The United States Court of Appeals for the Fifth Circuit issued a judgment and opinion affirming the district court's judgment "for essentially the reasons stated by the trial judge." (App. 1-2)

REASONS FOR GRANTING THE WRIT

I. This Court should grant the writ and clarify that Rule 12(b)(6) does not permit dismissal of a claim for copyright infringement in which the court's only ground for dismissal is the fact-intensive determination that there was no substantial similarity between the copyrighted work and the allegedly infringing material.

To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard under Rule 12(b)(6) is not akin to a "probability requirement," although it does ask for more than a sheer possibility that a defendant has acted unlawfully. *Id.* at 556. Determining whether a complaint states a plausible claim is "a context-specific task." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

In their motion to dismiss, Respondents do not dispute that Randolph owns a valid copyright over the Book. (USCA5 83 n.3; *see also* USCA5 21) Nor do Respondents dispute that they had access to Randolph's copyrighted works. (USCA5 83 n.4) Respondents' only asserted ground for dismissing Randolph's copyright claim is that the Book and the Movie are not substantially similar. The district court granted Respondents' motion, concluding as a matter of law that "the record shows no substantial similarity between the two works." (USCA5 172; App. 17) The court further held that "any attempt to amend would

be futile," and therefore ordered Randolph's claims dismissed without leave to amend. (*Id.*) The court later denied Randolph's Rule 59(e) motion to amend or alter the judgment. (USCA5 324-356; App. 22-64) In its order denying Randolph's Rule 59(e) motion, the court acknowledged that the materials filed with Randolph's motion "point out some similarities between the two works," but the court nonetheless held that Randolph did not show "that there is a 'substantial similarity' that would plausibly make [Respondents'] work infringing." (USCA5 337; App. 40) The Fifth Circuit affirmed. (App. 1-2) These holdings are erroneous, and this Court should grant a writ of certiorari to clarify the proper role of Rule 12(b)(6) in copyright proceedings.

To establish a claim for copyright infringement, a plaintiff must prove (1) ownership of a valid copyright, and (2) copying by the defendant of constituent elements of the plaintiff's work that are copyrightable. *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The second element – actionable copying – consists of two separate inquiries: (1) whether the infringer copied the plaintiff's work (i.e., factual copying), and (2) whether there is "substantial similarity" between the copyrighted work and the infringing work. *See Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576 (5th Cir. 2003).

The Circuits have taken divergent views on what exactly is encompassed in the "substantial similarity" inquiry. For example, the Ninth Circuit divides this inquiry into an "extrinsic test" and an "intrinsic test."

See Funky Films, Inc. v. Time Warner Entm't Co., 462 F.3d 1072, 1077 (9th Cir. 2006). The extrinsic test is objective and focuses on "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events" between the two works. *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994). The intrinsic test "examines an ordinary person's subjective impressions of the similarities between two works." *Funky Films*, 462 F.3d at 1077. Significantly, the Ninth Circuit concludes that courts may apply only the extrinsic test before trial – the intrinsic test "is exclusively the province of the jury." *Id.*

In contrast to the Ninth Circuit's approach, the Fifth Circuit applies a single test for substantial similarity, in which "a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as 'substantially similar.'" *Creations Unlimited v. McCain*, 112 F.3d 814, 816 (5th Cir. 1997). The Fifth Circuit expressly notes that its substantial-similarity inquiry is "similar to the Ninth Circuit's intrinsic test, which is 'subjective and asks whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.'" *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 374 n.13 (5th Cir. 2004) (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)).

Regardless of which version of the substantial-similarity test applies, it has no place in the determination whether the plaintiff's complaint "fails to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The analysis required to determine that, as a matter of law, no reasonable person would view two works as substantially similar goes far beyond determining whether the complaint contains sufficient facts to state a claim that is plausible on its face. *See Twombly*, 550 U.S. at 570. This is especially true under circumstances like those present in this case, which require comparison of a 158-page book and a 93-minute movie. Randolph provided the district court with a multimedia PowerPoint presentation setting forth general similarities between the plot, themes, and characters in the two works, as well as numerous specific scenes and details that were similar. The district court even acknowledged that there were "some similarities between the two works," but the court determined that those similarities were "insignificant." (App. 40) Such a determination was not appropriate in analyzing whether Randolph's complaint should be dismissed under Rule 12(b)(6).

II. The Court should grant the writ and clarify that the substantial-similarity test requires a comparison between the similarities between two works and not the differences.

Moreover, Rule 12(b)(6) dismissal was inappropriate because the district court improperly focused

on the differences between some elements in the two works. The law is settled that the comparison must focus on the similarities, not the differences, between the two works. This is because an infringer cannot escape a claim of infringement by showing how much of the work it did not copy. *Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990) (quoting NIMMER ON COPYRIGHT § 13.03[B][1][a], at 13-48 to -49). Even if the copied portion is relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity. *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987). As demonstrated by the materials Randolph provided to the district court, there are genuine fact issues sufficient to preclude a finding that, after viewing the evidence and drawing inferences in a manner most favorable to Randolph, "no reasonable juror could find substantial similarity of ideas and expression." *Gen. Univ. Sys., Inc. v. Lee*, 379 F.3d 131, 142 (5th Cir. 2004); *see also Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001) ("[J]udgment on the pleadings is appropriate only if there are no disputed issues of fact. . . .").

The district court is similarly misguided in its conclusion that the "differences in concept and feel" perceived by the court justify dismissal under Rule 12(b)(6) of Randolph's claims. The only examples the district court cites involve comparisons between works that are radically different in tone, theme, and purpose. *See Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (comparing a 400-page adult novel and film adaptation, described by the court as "high-tech

horror stories with villainous characters and gruesome bloodshed," to a series of 30-page books written for children and intended to educate); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 92 (2d Cir. 1976) (comparing a 35-page book presenting a picture of family life in the Russian Ukraine and developing the relationship between a mother and daughter to a two-page illustrated story "barren of meaningful setting or character development"). Any perceived difference in the "concept and feel" of the Book and Movie in this case is not so great as to preclude the possibility that, given the significant similarities, a reasonable observer might find the works are substantially similar. Accordingly, the district court erred in applying Rule 12(b)(6) to dismiss Randolph's copyright claim.

CONCLUSION

Petitioner respectfully requests that the Court grant certiorari, consider this case on the merits, and answer the questions presented.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIRTH CIRCUIT

No. 09-20495

TINA M. RANDOLPH,

Plaintiff-Appellant-Cross Appellee

v.

DIMENSION FILMS; MIRAMAX FILM CORP.; SONY PICTURES ENTERTAINMENT, INC.; BUENA VISTA HOME ENTERTAINMENT, INC.; COLUMBIA PICTURES; THE WALT DISNEY CO.; TROUBLEMAKER STUDIOS; ROBERT RODRIGUEZ; R. M. RODRIGUEZ, By parent and next friend, Robert Rodriguez; ELIZABETH AVELLAN; JOHN DOE(S) 1-999,

Defendants-Appellees-Cross Appellants

JOHN DOE(S) 1-999

Defendant-Appellee

Appeals from the United States District Court
for the Southern District of Texas
No. 4:08-CV-1836

(Filed Jun. 16, 2010)

Before HIGGINBOTHAM, DAVIS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

We affirm for essentially the reasons stated by the trial judge.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

TINA M. RANDOLPH, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-08-1836
DIMENSION FILMS, *et al.*, Defendants.	§	

MEMORANDUM AND ORDER

In this action brought under the Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et seq.*, plaintiff Tina M. Randolph, the author of a book published by her "dba," Rhapsody Publishing, alleges that the defendants infringed on her copyright. The book is *Mystic Deja: Maze of Existence*, the first of an anticipated twelve-volume science-fiction series. Randolph published it in December 2002. In this suit, she alleges that the defendants' motion picture, *The Adventures of Shark Boy and Lava Girl in 3-D*, infringed on her copyrighted book. Randolph also asserts claims for unfair competition under the Lanham Act, 15 U.S.C. § 1125(a), and for violations of the Texas Deceptive Trade Practices Act (DTPA), TEX. BUS. & COM. CODE §§ 17.45(4), 17.50.

The defendants, Dimension Films, Miramax Film Corp., SONY Pictures Entertainment, Inc., Buena Vista Home Entertainment, Inc., Columbia Pictures Industries, Inc., The Walt Disney Co., Troublemaker

Studios, Robert Rodriguez, Racer Max Rodriguez, and Elizabeth Avellan, have moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Randolph attached to her complaint cover artwork from the book and from the allegedly infringing movie, as well as a press release for the series and part of the book. The defendants attached to their motion to dismiss a copy of Randolph's book and of their movie, which this court has read and watched. The defendants assert in their motion to dismiss that the movie and the plaintiff's book are so dissimilar as to defeat the copyright infringement claim as a matter of law. The defendants also assert that the unfair competition claim and the DTPA claim fail to state a claim on which relief can be granted.

Based on a careful review of the complaint, the motion, and response, the movie and book, and the applicable law, this court grants the motion to dismiss, without leave to amend. The reasons are stated below.

I. The Legal Standards

A. Motion to Dismiss under Rule 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964 (2007), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing

that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). *Twombly* abrogated the Supreme Court's prior decision in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Twombly*, 127 S. Ct. at 1969 ("*Conley's* 'no set of facts' language . . . is best forgotten as an incomplete, negative gloss on an accepted pleading standard. . . ."). To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974; *see also Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 372 (5th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1974).

A "complaint must allege 'more than labels and conclusions,'" and "'a formulaic recitation of the elements of a cause of action will not do.'" *Norris v. Hearst Trust*, 500 F.3d 454, 464 (5th Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1965). "'Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests.'" *Dark v. Potter*, 293 F. App'x 254, 258 (5th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1965 n.3). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's

grounds for entitlement to relief – including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1964-65); *see also In re S. Scrap Material Co.*, 541 F.3d 584, 587 (5th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1965). "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Cuvillier*, 503 F.3d at 401 (quoting *Twombly*, 127 S. Ct. at 1966). Although material allegations in the complaint must be accepted as true and construed in the light most favorable to the nonmoving party, a court is not required to accept conclusory legal allegations cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *See Elsensohn*, 530 F.3d at 371-72.

When a plaintiff's complaint must be dismissed for failure to state a claim, the plaintiff should generally be given at least one chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner

that will avoid dismissal."); *see also United States ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 403 (5th Cir. 2004) ("Leave to amend should be freely given, and outright refusal to grant leave to amend without a justification . . . is considered an abuse of discretion.") (internal citations omitted). However, a plaintiff should be denied leave to amend a complaint if the court determines that "the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face." 6 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1487 (2d ed. 1990); *see also Ayers v. Johnson*, 247 F. App'x 534, 535 (5th Cir. 2007) ("'[A] district court acts within its discretion when dismissing a motion to amend that is frivolous or futile.'") (quoting *Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S. of Am. Co.*, 195 F.3d 765, 771 (5th Cir. 1999)); *see also Great Plains Trust Co.*, 313 F.3d at 329.

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, but that includes attachments thereto. FED. R. CIV. P. 12(b)(6). "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled*

on other grounds, *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Field v. Trump*, 850 F.2d 938, 949 (2d Cir. 1988). In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated.

B. Copyright Infringement

To prove copyright infringement, a plaintiff must show ownership of a valid copyright and actionable copying. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Galiano v. Harrah's Operating Co., Inc.*, 416 F.3d 411, 414 (5th Cir. 2005). "A plaintiff bringing a claim for copyright infringement must demonstrate '(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.'" *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006) (quoting *Feist*, 499 U.S. at 361). When, as here, there is no direct evidence of copying, the second element requires the plaintiff to prove that the defendants had access to the plaintiff's copyrighted work and that there is substantial similarity of protected elements between the two works. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003). "Substantial similarity" may often be decided as a matter of law, on either a motion to dismiss or on summary judgment. *See, e.g., Tabachnik v. Dorsey*, 257 F. App'x 409, 2007 WL 438196, at *1 (2d Cir. Dec. 13, 2007) (Rule 12(b)(6)); *Burt v. Time Warner, Inc.*, 213 F.3d 641,

2000 WL 328117, at *2 (9th Cir. Mar. 24, 2000) (Rule 12(b)(6)); *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004) (Rule 56); *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996) (Rule 56).

A court must compare the copyrighted work and the accused work to determine whether there is substantial similarity between the protectable elements in the works, determining whether there are articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events. A court must distinguish between the protectable and unprotectable material because a party claiming infringement may place "'*no* reliance upon any similarity in expression resulting from' unprotectable elements." *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994) (quoting *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987)). Copyright law does not protect an idea, but only "the expression of an idea." *Williams v. Crichton*, 84 F.3d at 587. The defendants do not challenge Randolph's claim to a valid copyright in the novel. The issue is whether there is substantial similarity between the protectable elements of Randolph's work and the defendants' movie. *Id.*

II. Analysis

A. The Copyright Infringement Claim

The side-by-side comparison of the plaintiff's book and the defendants' movie leads to the conclusion that there is no substantial similarity in the

protectable elements of the works. The basic elements of plot, themes, dialogue, mood, setting, pace, characters, and sequence of events – and the overall concept and feel of both works – are very different.

Mystic Deja: Maze of Existence features as its protagonist Deja Chanel, an 18 year-old girl whose mother died in childbirth. Her father is an inventor of the "Sole Receptacle," a "gateway to the mind's eye." His consciousness becomes trapped in this world of imagination that he created. With the help of her boyfriend, Joshua, and a close female friend, Kyra, Deja uses a modified version of the "Sole Receptacle" to enter the realm of imagination to find her father and try to save him. As a guide in the realm of imagination, Deja uses her father's journal, in which he recorded his experiments and inventions. The journal marvelously updates with new entries and instruction to help Deja search for her father's consciousness.

The plot revolves around the mental and physical challenges Deja faces in battling an "emergist," Great Reign, as she tries to find her father's consciousness. "Emergy" is mind's energy; an "emergist" is able to use the mind's energy to make the mind's thoughts a reality. Great Reign wants to rule by killing other emergists, taking their power for his own to control the dream world, destroying the boundaries between sections of the universe necessary for order and ultimately taking over the universe. Deja takes instruction from an "emergist" named Zim Logi in learning to control her own "emergy."

The novel ends without an end to the journey or battle. Deja's search for her father's consciousness must continue. She is a strong and confident young adult who becomes stronger and more confident as she overcomes obstacles and enemies. The novel is designed for "young adults" and explores "infinite levels of the human psyche."

By contrast, the movie is a "family adventure" featuring "pint-sized action masters." The protagonist is a ten year-old boy named Max. His parents fight, he hates school, he is bullied, and he has no friends. He is an outcast with little confidence. The story is based on a dream world that Max invents as a retreat from his loneliness and problems.

Max writes his dreams down in a journal. He finds that he can make the dreams a reality on the imaginary "Planet Drool." On this planet, he meets Sharkboy and Lavagirl. Planet Drool is a "kid paradise" that features such child-pleasing whimsical elements as a "train of thought" that travels to the "Land of Milk and Cookies." The plot involves Max's battle with "Mr. Electric" and his sidekick "Minus," who is a dream version of "Linus," the bully Max faces in the real world. Mr. Electric powers Planet Drool; he is a dream version of Mr. Electricidad, Max's teacher. In the movie, Max saves his dream world by persuading Minus to restore it to its original condition. Mr. Electric leaves the dream world and comes to Max's school. Max returns to real life and works with his classmates to defeat Mr. Electric. Max's parents overcome their marital problems. At

the end, Max has ended his difficulties with Minus; saved Planet Drool; regained a happy relationship with his father, and won his classmates' approval.

Besides the differences between the plots and the main characters – the 18 year-old confident girl who is the protagonist in *Mystic Deja* and the 10 year-old outcast boy who is the protagonist in *Sharkboy* – the other characters in each work are also very different. In *Mystic Deja*, the sidekicks are Joshua and Kyra in the real world and Sil and Celeste in the realm of imagination. They have no special powers, although they all know some form of martial art. Joshua is a regular teenage boy who drives a sports car, plays a guitar, and is smart. Kyra is a teenage girl with a sense of humor. Sil lives in a tree with his family in a swamp. Celeste is an orphan whose parents were killed by Great Reign's army of drones or zombies, created from the people whose "emergy" he stole. By contrast, Sharkboy and Lavagirl are cartoonish characters with special powers. Sharkboy is a boy who was raised by fish after a shipwreck that separated him from his father. Sharkboy has gills, shark teeth, and fins and goes into a frenzy when angered. In the movie, Max is able to provide Sharkboy with hope that he will find his father. The movie ends with Sharkboy becoming King of the Ocean and searching for his father in the ocean, using a submarine. Lavagirl is made of lava, has no family, and is angry at Max for making her so destructive. Max helps her realize that she is not destructive but a constructive source of light.

The antagonists are also very different. In *Mystic Deja*, the antagonist is the megalomaniacal emergist, Great Reign. In *Sharkboy*, the antagonists are Mr. Electric and Minus, a dream counterpart to people who torment Max in real life.

In addition to the character and plot differences, the themes and tone are very different. *Mystic Deja* is a science-fiction work for young adults, featuring 18 year-olds. The themes are the "human psyche" and the power of the mind, conscious and otherwise; *Sharkboy* is a children's fantasy that features ten year-olds and has as its themes how to overcome loneliness and deal with bullies.

Randolph argues that both the book and the movie involve a dream world, a dream journal, "shape shifting" creatures, a bike, and attacking fish, to support her claim of substantial similarity. The general concept of an imaginary world or realm, or of a character searching for a father, cannot be copyrighted. *See Williams v. Crichton*, 84 F.3d at 589 ("While both . . . works share a setting of a dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers, these settings are classic *scenes a faire* that flow from the uncopyrightable concept of a dinosaur zoo."); *Reyher v. Children's Television Workshop*, 533 F.3d 87, 92 (2d Cir. 1976) (concept of child searching for lost mother not copyrightable). The expressions of these ideas are copyrightable but in this case, are not substantially similar.

In the book, Deja searches for her father's consciousness in an imaginary realm created by a machine. In the movie, Max creates a dream world to escape his real-life problems. The journals in the two works are very different. The journal in *Mystic Deja* was created by Deja's father, who can update it with new entries despite his unconscious state. Deja uses the journal to help as she tries to find and save her father's consciousness and battle Great Reign. The journal in *Sharkboy* is Max's own journal about his dreams. Max's journal is stolen by Linus, the boy who bullies him in real life, and is used by the dream antagonist, Minus, to try to ruin Planet Drool.

Both works contain a version of a bike, but again, they are very different. In *Mystic Deja*, the bike flies and allows Deja to escape from one terrain in the imaginary realm and enter another. In *Sharkboy*, the bike is made of lava and does not fly or allow the characters to escape.

Both works contain beasts, but different beasts. In the movie, Minus and Max duel and each create a cloud of objects. Minus makes a cloud of piranhas that Max captures in water bubbles. Max makes a cloud of butterflies. *Mystic Deja* features a butterfly, but not as part of a battle. Deja makes a butterfly appear to show that she has learned to "emerge" objects.

Randolph also argues that there are visual similarities between the graphics in the book and the movie. She points to a picture of the "Mecca of Ice" at

the end of the book and a picture of an "Ice Castle" in the movie. Contrary to the plaintiff's argument, the "Mecca of Ice" and the "Ice Castle" do not have "substantially similar aesthetics." The picture of the Mecca of Ice in the book looks like the skyline of a city seen from a distance. In the movie, the Ice Castle appears briefly as a tall single ice tower, surrounded by a circular ice road.

In general, the physical "aesthetics" and tone of the two works are very different. The mood and appearance of the book is black and gothic. The movie is bright and busy, featuring "3-D special effects" (the glasses come with the DVD).

Randolph argues that the themes in the book and movie, of searching for one's father and the "true identity of power that he or she possesses," are substantially similar. Copyright law does not protect an idea, but only "the expression of an idea," *Williams v. Crichton*, 84 F.3d at 587, and the works must share a "similarity of expression," *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 309 (S.D.N.Y. 1999) (similarity of expression is evinced by "similarities of treatment, details, scenes, events and characterization, or a similarity in their total concept and feel") (internal quotations and citations omitted). Differences in total concept and feel are important in determining the degree of similarity between the two works. *See Williams*, 84 F.3d at 589 (affirming summary judgment against the plaintiff, a children's author, and holding that "the total concept and feel of the two works differ substantially" when the defendants'

works are "high-tech horror stories with villainous characters and gruesome bloodshed" and the plaintiff's are "adventure stories and, although suspenseful in places, have happy endings."); *Hogan*, 48 F. Supp. 2d at 311 (the differences in the plaintiffs' and defendants' expression of similar ideas, "including the differences in [the works'] total look and feel, the interactions of the characters and the plot," were "so pronounced" as to preclude finding of substantial similarity).

The themes that Randolph identifies – searching for one's father and identifying one's strengths – appear in innumerable works of literature and are the stuff of many books, plays, and movies. The presence of these themes in the book and movie does not make them substantially similar. "Material or themes commonly repeated in a certain genre are not [protectable] by copyright," nor are "so-called *scenes à faire*." *American Direct Mktg.*, 783 F. Supp. 84, 95 (E.D.N.Y. 1992); *see also Brown v. Perdue*, No. 04 Civ. 7417, 2005 WL 1863673, at *8 (S.D.N.Y. Aug. 4, 2005) (noting, in response to the plaintiff's argument that Dan Brown's *The Da Vinci Code* infringed on his books that also incorporate religious themes, that the ideas and themes "find their origin in historical facts, events and figures, as well as pre-existing works"); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 543 (S.D.N.Y. 2000) (structural similarities between the parties' musical compositions "are not significant because they are uniformly shared with most modern popular rock music"); *Historical Truth Prods., Inc. v. Sony*

Pictures Entm't, Inc., No. 93 Civ. 5529, 1995 WL 693189, at *8 (S.D.N.Y. Nov. 22, 1995) ("[C]onspiracies, characters with superhuman qualities, and advanced technology . . . are unoriginal and uncopyrightable stock elements of the action-adventure and science fiction film genres"); *Jones v. CBS, Inc.*, 733 F. Supp. 748, 754 (S.D.N.Y. 1990) ("basic plot ideas" are not protectable); *Russ Berrie & Co. v. Jerry Elsner Co., Inc.*, 482 F. Supp. 980, 986 (S.D.N.Y. 1980) (shared characteristics of both parties' Santa toys of a "traditional red suit and floppy cap, trimmed in white, black boots and white beard" and "nose like a cherry" are common to all Santas and not probative of copying). The similarities that Randolph asserts are either stock elements of science-fiction or adventure stories or plot elements that naturally flow from the broad themes that the two works share with many other works.

In sum, the record shows no substantial similarity between the two works. The motion to dismiss the Copyright Act claim is granted. Because any attempt to amend would be futile, the dismissal is without leave to amend.

B. The Unfair Competition Claim

Randolph alleges a claim under the Lanham Act, 15 U.S.C. § 1125(a). She argues that this is a "reverse passing off claim" based on the defendants' false designation of the origin and authorship of the movie as their work rather than Randolph's.

The Lanham Act does not protect an author's expression from false designation. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003). The phrase "origin of goods" in the Lanham Act "refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods." *Id.* The copyright and patent laws, not the Lanham Act, protect originality or creativity. *Id.*

In the complaint, and in response to the motion to dismiss, Randolph does not argue that the defendants offered for sale tangible goods that she produced, but that they copied from a book the she wrote in creating the movie. Such conduct does not give rise to a claim under the Lanham Act. The claim is dismissed for failure to state a claim upon which relief can be granted, without leave to amend.

C. The Texas Deceptive Trade Practices Act Claim

The defendants move to dismiss the Texas DTPA claim on the basis that it is preempted by the federal Copyright Act. The Copyright Act generally preempts state law claims that are equivalent to any of the exclusive rights created by the copyright law. *See* 17 U.S.C. § 301(a). In determining whether a state-law claim is preempted by federal copyright law, the court applies a two-part test. *See Daboub v. Gibbons*, 42 F.3d 285, 288-89 (5th Cir. 1995). First, the court

examines whether the claim falls within the subject matter of copyright as defined by 17 U.S.C. § 102. Next, the cause of action is examined "to determine if it protects rights that are 'equivalent' to any of the exclusive rights of a federal copyright, as provided in 17 U.S.C. § 106," which gives copyright owners the exclusive right to authorize reproduction, adaptation, publication, performance, and display of their copyrighted works. *Id.*; *see also Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921, 944 (S.D. Tex. 2004). "The second condition requires a comparison of the nature of the rights protected under federal copyright law with the nature of the state rights for which the plaintiff seeks protection." *Sefton v. Jew*, 201 F. Supp. 2d 730, 745 (W.D. Tex. 2001). If the defendants' alleged acts would violate both state law and federal copyright law, then the state right is deemed "equivalent to copyright." *Id.* (quoting *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 787 (5th Cir. 1999)). However, if the plaintiff has alleged facts corresponding to an "extra element," such as a breach of fiduciary duty that would render his claims "different in kind from a copyright infringement claim," then his state law claims are not preempted. *Id.*; *Keane*, 297 F. Supp. 2d at 945.

In this case, the gravamen of the plaintiff's complaint is the wrongful copying of her work and the distribution of the infringing work. The state-law DTPA claim is preempted by the Copyright Act claim. *See Daboub*, 42 F.3d at 289 (finding preemption

where "[t]he core of each . . . state law theor[y] of recovery . . . [wa]s the same: the wrongful copying, distribution, and performance" of musical lyrics); *Sefton*, 201 F.Supp.2d at 746 (the state law conversion claim was preempted because the plaintiff's complaint alleged "only one set of operative facts" and alleged no "conduct by Defendants to support his conversion claim that is qualitatively different from the conduct alleged to support his copyright infringement claim"); *Keane*, 297 F. Supp. 2d at 945 (the state law claims – including unfair competition and misappropriation claims – were preempted when "[t]he core of each of [the plaintiff]'s state law claims [wa]s identical: the wrongful copying of an idea for a talent show"). Randolph has alleged no facts that could support a recovery of damages based on state law unfair competition, misappropriation, and unfair trade practices claims that would be "different in kind" from the wrongful use of her copyrighted book.

At the initial conference in this case, Randolph agreed that the DTPA claim was preempted. The DTPA claim is dismissed.

III. Conclusion

For the reasons stated above, the defendants' motion to dismiss is granted without leave to amend. A separate order of dismissal will be entered.

SIGNED on February 17, 2009, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

TINA M. RANDOLPH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H-08-1836
DIMENSION FILMS *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

The plaintiff, Tina M. Randolph, seeks reconsideration of this court's order entered on February 17, 2009, granting the defendants' motion to dismiss her copyright infringement claim under Federal Rule of Civil Procedure 12(b)(6), without leave to amend. The defendants are Dimension Films, Miramax Film Corp., Sony Pictures Entertainment, Inc., Buena Vista Home Entertainment Inc., Columbia Pictures Industries, The Walt Disney Co., Troublemaker Studios, Robert Rodriguez, Racer Max Rodriguez, and Elizabeth Avellan. Randolph contends that this court erred in concluding that there was no substantial similarity between her book, *Mystic Deja: Maze of Existence*, and the defendants' motion picture, *The Adventures of Shark Boy and Lava Girl in 3-D.* (Docket Entry No. 34). The defendants have responded to the motion to reconsider. (Docket Entry No. 42). The defendants have also moved for an award of attorneys' fees and costs under 17 U.S.C. § 505 in the

amount of $36,565.15. (Docket Entry No. 32). Randolph has responded, (Docket Entry No. 41), and the defendants have replied, (Docket Entry No. 45).

Based on a careful review of the motions, responses and reply; the record; and the applicable law, this court denies Randolph's motion for reconsideration and grants the defendants' motion for attorneys' fees in part, awarding $3,816.73 in fees and $1,288.27 in costs.

The reasons for these rulings are set out in detail below.

I. The Motion for Reconsideration

Randolph sued under the Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et seq.*, alleging that the defendants' 2005 movie, *The Adventures of Shark Boy and Lava Girl in 3-D* (2005), infringed the 2002 copyright on her book, *Mystic Deja: Maze of Existence.* Randolph attached to her complaint cover artwork from the book and from the allegedly infringing movie, as well as a press release for the series and part of the book. The defendants moved to dismiss on the ground that the movie and book were so dissimilar that the claim for copyright infringement failed as a matter of law. The defendants attached to their motion a copy of the entire book and movie. After reviewing the complaint, the motion and the response, and the attached movie and book, the court granted the defendants' motion to dismiss without leave to amend. (Docket Entry No. 30). Randolph

contends that this court clearly erred in concluding that there was no substantial similarity between the two works and in denying leave to amend. Randolph seeks leave to supplement her pleadings with additional exhibits that she contends will aid the court in identifying points of substantial similarity between the two works. (Docket Entry No. 34 at 9). The defendants respond that dismissal under Rule 12(b)(6) without leave to amend was proper, and that neither the record nor Randolph's proposed additional materials provide a basis for reconsideration. (Docket Entry No. 42 at 1).

A. The Legal Standard for a Motion for Reconsideration

The Federal Rules of Civil Procedure do not specifically provide for motions for reconsideration. *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 328 (5th Cir. 2004); *see also St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997). Reconsideration motions are generally analyzed under the standards for a motion to alter or amend judgment under Rule 59(e) or a motion for relief from a judgment or order under Rule 60(b). *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n. 10 (5th Cir. 1998). If a motion for reconsideration is filed within ten days of the judgment or order of which the party complains, it is considered a Rule 59(e) motion; otherwise, it is treated as a Rule 60(b) motion. *Id.* (internal citations omitted); *see also Lavespere v. Niagara Machine & Tool Works, Inc.*, 910

F.2d 167, 173 (5th Cir. 1990) ("Under which Rule the motion falls turns on the time at which the motion is served. If the motion is served within ten days of the rendition of judgment, the motion falls under Rule 59(e); if it is served after that time, it falls under Rule 60(b)."), *abrogated on other grounds, Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994) (en banc). Randolph's motion was filed within 10 days of this court's entry of final judgment. Rule 59(e) applies.

A Rule 59(e) motion "calls into question the correctness of a judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004) (citing *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002)). "A motion to alter or amend the judgment under Rule 59(e) 'must clearly establish either a manifest error of law or fact or must present newly discovered evidence' and 'cannot be used to raise arguments which could, and should, have been made before the judgment issued.'" *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). Relief is also appropriate when there has been an intervening change in the controlling law. *Schiller v. Physicians Res. Group Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, ___ U.S. ___, 128 S.Ct. 2605, 2617 n.5 (2008) (quoting 11 CHARLES A. WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 2810.1, at 127-28 (2d ed.1995)).

"A Rule 59(e) motion is not a 'vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment' but instead has a 'narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.'" *Baldwin v. Layton*, 300 F. App'x 321, 323-24 (5th Cir. 2008) (quoting *Templet*, 367 F.3d at 479).

B. Analysis

1. Substantial Similarity May Properly Be Decided on a 12(b)(6) Motion to Dismiss

Randolph contends that dismissal under Rule 12(b)(6) on the basis of lack of substantial similarity was improper because in copyright cases, "'a determination of substantial similarity should typically be left to the fact-finder.'" (Docket Entry No. 34 at 1 (quoting *King v. Ames*, 179 F.3d 370, 376 (5th Cir. 1999)). Randolph also contends that this court applied the wrong Rule 12(b)(6) standard. Randolph cites *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000), which cites the Supreme Court's opinion in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), for the proposition that "[m]otions to dismiss under Rule 12(b)(6) are viewed with disfavor and should rarely be granted." (Docket Entry No. 34 at 4). Neither argument is a basis for reconsideration.

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." In

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). *Twombly* abrogated *Conley v. Gibson*, 355 U.S. at 45-46 (1957), which held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Twombly*, 550 U.S. at 562-63 ("Conley's 'no set of facts' language . . . is best forgotten as an incomplete, negative gloss on an accepted pleading standard. . . ."). To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 372 (5th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). In *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009), the Supreme Court elaborated on the pleading standards discussed in *Twombly*. The Court explained that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555). *Iqbal* explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

Complaints alleging copyright infringement are no exception to this rule and can be decided as a matter of law. "To determine whether an instance of copying is legally actionable, a side by side comparison must be made between the original and the copy to determine whether a layman would view the two works as 'substantially similar.'" *Creations Unlimited, Inc. v. McCain*, 112 F.3d 814, 816 (5th Cir. 2004). A determination that no substantial similarity exists as a matter of law is "appropriate if the court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the nonmoving party, that no reasonable juror could find substantial similarity of ideas and expression.'" *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 142 (5th Cir. 2004) (citing *Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 395 (5th Cir. 2001)); *see also Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2d Cir. 1991) (upholding district court's conclusion that there was no substantial similarity as a matter of law); *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1247 (11th Cir. 1999) ("[N]on-infringement may be determined as a matter of law on a motion for summary judgment, either because the similarity between two works concerns only non-copyrightable elements of the plaintiff's work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar.") (citations omitted)).

When the original work and the allegedly infringing copy are submitted with the pleadings and available to the court for side-by-side comparison,

substantial similarity can be decided on a Rule 12(b)(6) motion to dismiss. *See Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945) ("There is ample authority for holding that when the copyrighted work and the alleged infringement are both before the court, capable of examination and comparison, non-infringement can be determined on a motion to dismiss."); *Rosenfeld v. Twentieth Century Fox Film*, No. Cv. 07-7040, 2009 WL 212958, at *3 (C.D. Cal. Jan. 28, 2009) (citing *Christianson*; dismissing with prejudice under Rule 12(b)(6) after finding no substantial similarity); *Capcom Co. v. The MKR Group, Inc.*, No. C. 08-0904, 2008 WL 4661479, at *11 (N.D. Cal. Oct. 20, 2008) (same); *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1131, 1139 (C.D. Cal. 2007) (same); *Tabachnik v. Dorsey*, 257 F. App'x 409, 410 (2d Cir. 2007) (upholding dismissal of the plaintiff's copyright infringement claim with prejudice based on comparison of the plaintiff's doctoral dissertation and excerpts from the defendant's work); *Taylor v. IBM*, 54 F. App'x 794, 2002 WL 31845220, at *1 (5th Cir. 2002) (upholding dismissal with prejudice of a copyright infringement claim under Rule 12(b)(6)); *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143 (8th Cir. 1989) (upholding dismissal with prejudice of copyright infringement claim alleging actionable copying of plaintiff's song lyrics by the artist Prince; noting that "[t]he District Court had before it . . . complete copies of both [plaintiff's] song and Prince's and was therefore in proper position to apply the substantial similarity test").

In this case, Randolph attached excerpts from her book and the defendants' movie to her complaint, along with copies of art work. The defendants attached complete copies of both the book and the movie to their motion to dismiss. Randolph does not dispute that these were properly considered as part of the pleadings. *See Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Collins*, 224 F.3d at 498-99 ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim."). This court performed a side-by-side comparison of the works and concluded that the allegedly copied elements did not involve protected expression or would not strike a layperson as being substantially similar. (Docket Entry No. 30 at 12). This court's dismissal of Randolph's copyright claims under Rule 12(b)(6) does not provide a basis for reconsideration. In concluding that there was no substantial similarity between Randolph's book and the defendants' movie, this court also found that any attempt to amend would be futile. This conclusion as to futility flowed from the "nature and grounds for the[ ] dismissal[ ]." *Capcom*, 2008 WL 4661479, at *1. Substantial similarity is determined by side-by-side comparison of the works. This court had and used complete copies of the works in deciding the motion to dismiss. Only the works themselves are probative in a substantial similarity analysis. *See Peel & Co.*, 238 F.3d at 398 (substantial similarity is to be determined "without any aid or suggestion or critical analysis by others")

(citing *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[E][1][a], at 13-79 (2000)).

The works themselves, which this court fully considered, were not substantially similar. No pleading amendment by Randolph could change the works. When a claim of substantial similarity is dismissed a matter of law, dismissal with prejudice is the logical result. *See, e.g., Rosenfeld*, 2009 WL 212958, at *3; *Capcom*, 2008 WL 4661479, at *11; *Zella*, 529 F. Supp. 2d at 1139; *Tabachnik*, 2007 WL 4386196, at *1; *Taylor v. IBM*, 54 F. App'x 794, 2002 WL 31845220, at *1; *Nelson v. PRN Prods., Inc.*, 873 F.2d at 1143-44 (all dismissing with prejudice). This court's dismissal with prejudice does not provide a basis for reconsideration.

2. The Record Shows No Substantial Similarity

Randolph contends that this court did not pay sufficient attention to the similarities between the works but "instead focuse[d] on the differences in some elements in the two works." Randolph argues that a proper comparison "must focus on the similarities, not the differences, between the two works." (Docket Entry No. 34 at 5).

Randolph's argument is flawed both legally and factually. Differences play an important role in determining whether two works are substantially

similar. "As a matter of logic as well as law, the more numerous the differences between two works the less likely it is that will they create the same aesthetic impact so that one will appear to have been appropriated from the other." *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 913 (2d Cir. 1980). And this court's opinion did not focus solely on the differences. Instead, the opinion noted points of similarity between the two works but found that they were either insignificant or involved unprotectable elements. Randolph's motion for reconsideration points to a number of such similarities and asserts that they justify a finding of legally actionable "substantial similarity." (Docket Entry No. 34 at 5). Most of the similarities that Randolph identifies were addressed in this court's opinion. The additional similarities, and Randolph's new arguments, are addressed below; they do not provide a basis for reconsideration.

Randolph argues that in both the book and the movie, most of the action occurs in imaginary realms created and controlled by the thoughts and dreams of a person in the real world. In the book, the real-world person is Deja, the 18 year-old female protagonist of *Mystic Deja* who uses a journal written by her father to navigate through the imaginary "maze of existence." In the movie, the real-world person is Max, the 10-year-old male protagonist of *Shark Boy*, who uses a personal journal of his dreams as a guide to his imaginary realm. As this court noted, "the general concept of an imaginary world or realm . . . cannot be copyrighted." (Docket Entry No. 30 at 9); *see also* 17

U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.").

Randolph contends that the specific element of a journal as the vehicle through which both characters navigate their dream worlds makes this plot concept protectable creative expression. (Docket Entry No. 34 at 5-6). But controlling or accessing a dream world through a journal or literary work is a classic plot feature in works of fantasy and science fiction. *See, e.g., Niebla* ("*Fog*" or "*Mist*") (1914) (widely-read Spanish novel by Miguel de Unamuno about a man who learns his life is being written by the author of the book); *The NeverEnding Story* (1984) (film based on the 1979 German fantasy novel featuring a parallel world that the main character accesses through a novel describing it); *Myst* (1993) (graphic adventure video game in which the player explores a mystical island created and accessed through special books); *Inkheart* (2008) (fantasy film in which the protagonist's father has the power to control an imaginary realm and bring characters to life from a book); *Stranger than Fiction* (2006) (film about a man who discovers his life is being written by a novelist in her newest book). Like other *scenes à faire*, this plot feature is freely available for authors and creators to use in their creative works. *See Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 92 (2d Cir. 1976),

cert denied, 429 U.S. 980 (1976). And, as discussed in the earlier opinion, the journals in the book and movie are very different. "The journal in *Mystic Deja* was created by Deja's father, who can update it with new entries despite his unconscious state. . . . The journal in *Shark Boy* is Max's own journal about his dreams." (Docket Entry No. 30 at 9). There is no substantial similarity between these elements.

Randolph also claims that the story lines about the protagonists in the book and movie are similar. Both Deja and Shark Boy begin their tales by searching for their fathers and end still searching for their fathers. The concept of a character in search of a parent is both familiar and widely used. "The general concept . . . of a character searching for a father . . . cannot be copyrighted." (Docket Entry No. 30 at 9 (citing *Reyher*, 533 F.2d at 92 (the concept of a child searching for lost mother is not copyrightable)).

Randolph also asserts that the book and movie have substantially similar climactic fight scenes because both involve the protagonists learning to control their dream powers and using weapons that they have created with their imaginations. (Docket Entry No. 34 at 6-7). This is not a qualitatively important similarity; the fight scene is far from the heart of either work. And the element of a fight scene featuring powers and weapons derived from the characters' imaginations is not protectable. It flows naturally from the general concept of an imaginary world controlled by a character's mind or thoughts. *See Williams v. Crichton*, 84 F.3d at 589 (finding

electrical fences, automated tours, dinosaur nurseries, and uniformed workers were all "classic *scenes a faire* that flow from the uncopyrightable concept of a dinosaur zoo"); *Flynn v. Surnow*, 70 U.S.P.Q.2d 1231, 1237 (C.D. Cal. 2003) (finding that the use of a sniper rifle by an assassin was "an example of a *scene a faire* which flows naturally from a plot about an assassination attempt"). Moreover, the general notion of using the power of the mind as a weapon in battle has appeared countless times in well-known works of fantasy and science fiction. *See, e.g., Harry Potter and the Sorcerers' Stone* (1997) (featuring wizards who do battle and frequently conjure objects using the power of their minds); *Star Wars* (1977) (movie featuring "jedi warriors" who use "the force" to overcome their opponents); *The Uncanny-Men* (comic series that first appeared in 1963, featuring many characters who do battle with their minds).[1]

Finally, as the defendants point out, the fight scenes in the two works play out quite differently in all other respects. While the battle scene in the movie is highly physical and involves the protagonist, Max, and his companions fighting an army of the villains' minions, in the book Deja and her enemy engage in a one-on-one confrontation entirely in their minds.

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[1] For a more comprehensive, though by no means complete, list of fantasy and science fiction works featuring a variety of psychic powers, *see* http://tvtropes.org/pmwiki/pmwiki.php/Main/PsychicPowers (last visited June 25, 2009).

(Docket Entry No. 42 at 9). There is no substantial similarity between these elements.

Randolph also argues that this court erred in finding that the bikes in both works are not substantially similar. As pointed out in the prior opinion, the bike in *Mystic Deja* "flies and allows Deja to escape from one terrain in the imaginary realm and enter another[,]" while the bike in the movie is "made of lava and does not fly or allow the characters to escape." (Docket Entry No. 30 at 9). Randolph asserts that the bikes are similar in that both characters conjure them using their journals in order to serve their transportation needs and both are potentially flying bikes. (Docket Entry No. 34 at 7). Randolph's motion for reconsideration attaches an image of the "Shark Bike" or "Shark Mobile" from Max's journal in the movie. The image shows that the Shark Bike "Floats Like A Hover Craft." (Docket Entry 34, Ex. 3 at 7). In the movie, the "Shark Bike" does not fly; in the book Deja's bike does take off. And as the defendants point out, "flying bikes have been common since the iconic scene from *E.T. the Extra-Terrestrial*, in which E.T. makes Elliott's bicycle fly to avoid being captured by the police." (Docket Entry No. 42 at 10). More recently, the *Harry Potter* series features a flying motorcycle used to pass between the human and the magical worlds and to escape from perilous situations. *See, e.g., Harry Potter and the Sorcerer's Stone* (1997). The fact that both works feature a bike, even a flying bike, is not a basis for copyright

infringement, either alone or in combination with the other points Randolph identifies.

Finally, Randolph asserts that the court erred in finding that the works differed in "total concept and feel." (Docket Entry No. 34 at 7). After appraising the two works as a whole, this court concluded that the aesthetics and tone of the two works are very different. The mood and appearance of the book is dark and gothic. The movie is bright and busy. It features "3-D special effects" that can be seen with the special glasses that come with the DVD. (Docket Entry No. 30 at 10). In the prior opinion, this court cited *Williams v. Crichton*, 84 F.3d at 589, for the rule that when the "total concept and feel" of the two works differ substantially, the likelihood that the works are "substantially similar" is reduced. Randolph objects to the citation to *Williams*, arguing that the case is distinguishable because it involved comparing a children's book with "high tech horror stories," while *Mystic Deja* and *Shark Boy* are both works of adventure made for children. (Docket Entry No. 34 at 7-8). Randolph ignores the fact that comparing the overall concept and feel of two works is an established method of determining substantial similarity. "Essentially, the total-concept-and-feel locution functions as a reminder that while the infringement analysis must *begin* by dissecting the copyrighted work into its component parts in order to classify precisely what is not original, infringement analysis is not *simply* a matter of ascertaining similarity between components viewed in isolation." *Tufenkian Imp./Exp. Ventures,*

Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 134 (2d Cir. 2003) (emphasis in original). This comparison tool is not limited to cases involving works that are of distinct genres. *See Reyher*, 533 F.2d at 92 (finding that two children's books differed in their "total feel" when the plaintiff's work extensively developed its characters, while "the defendant's story [was] barren of meaningful setting or character development in its attempt to present its theme"). The look and feel of *Mystic Deja* and *Shark Boy* are very different, which weighs against a finding of substantial similarity. Even assuming that both works may be loosely characterized as "adventure stories," *Mystic Deja* features 18 and 19 year-olds and is targeted to older teens and young adults, while *Shark Boy* features a ten-year-old protagonist and is a movie about and for much younger children. Together with the significant differences between individual components and the unprotectable nature of these components, these differences in concept and feel amply support this court's conclusion that there was no substantial similarity as a matter of law.

3. The Additional Exhibits Do Not Provide a Basis for Reconsideration

Randolph also seeks leave to replead to assert additional specific similarities between the two works. She has submitted a document supplementing the allegations made in her complaint and in her response to the defendants' motion to dismiss, which she claims preclude dismissal. (Docket Entry No. 34,

Ex. B). Randolph has also submitted a PowerPoint presentation that performs a side-by-side comparison of the two works. (Docket Entry No. 34, Ex. A). These additional materials do not provide a basis for reconsideration.

For the most part, the newly submitted documents point out previously discussed similarities in more detail and provide quotes and images from the works. None of the purported similarities that the documents elaborate on provide a basis for reconsideration. To the extent that these documents raise any new arguments, they should have been presented in Randolph's opposition to the defendants' motion to dismiss. "A Rule 59(e) Motion is not a 'vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment' but instead has a 'narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.'" *Baldwin*, 300 F. App'x at 323-24 (quoting *Templet*, 367 F.3d at 479).

Moreover, demonstrative aids of the type that Randolph has submitted are not useful in determining substantial similarity. In analyzing whether a work is substantially similar to another and therefore infringing, a court must determine whether the lay observer would "detect piracy *without any aid or suggestions or critical analysis by others.* The reaction of the public to the matter should be immediate." *Peel & Co.*, 238 F.3d at 398 (citing *Harold Lloyd Corp.*, 65 F.2d at 18; 4 NIMMER & NIMMER, NIMMER ON COPYRIGHT § 13.03[E][1][a], at 13-79) (emphasis added).

This court compared the book and movie to determine a lay observer's immediate response, a comparison properly made without the plaintiff's "aid or suggestions."

Even taking the new demonstrative exhibits into account, however, there is no basis for reconsideration. The exhibits point out some similarities between the two works, most of which this court has already addressed. These similarities are insignificant as a matter of law or do not involve protectable elements. They do not show that there is a "substantial similarity" that would plausibly make the defendants' work infringing.

Randolph's motion for reconsideration is denied.

II. The Motion for Attorneys' Fees and Costs

The defendants seek $35,276.43 in legal fees plus $1,288.72 in costs and expenses. The defendants argue that attorneys' fee awards in copyright infringement cases are "routinely awarded" and are only denied in "exceptional circumstances," and contend that Randolph presents "no reason to deviate from the general rule of awarding attorney's fees" in this case. (Docket Entry No. 45 at 1). Randolph counters that the Copyright Act "does not entitle a prevailing party to attorney's fees as a matter of course," and that this court "must exercise its equitable discretion to determine whether a fee is justified." (Docket Entry No. 41 at 2). Randolph contends that the circumstances do not justify an

award of attorneys' fees and that the defendants have not shown that their requested fees are reasonable. (*Id.* at 5).

A. The Legal Standard

The Copyright Act gives courts discretion to award attorneys' fees to the prevailing party:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. In the Fifth Circuit, attorneys' fees awards are "'the rule rather then the exception and should be awarded routinely'" and "evenhandedly to both prevailing plaintiffs and defendants." *Virgin Records Am., Inc. v. Thompson*, 512 F.3d 724, 726 (5th Cir. 2008) (quoting *Positive Black Talk v. Cash Money Records, Inc.*, 394 F.3d 357, 380 (5th Cir. 2004)). But "recovery of attorney's fees is not automatic." *Id.* Fees "are to be awarded to prevailing parties only as a matter of the court's discretion," when such an award would "encourage the production of original literary, artistic, and musical expression for the good of the public." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524, 534 (1994). In determining whether a fee award is appropriate, a court should consider the factors set out in *Fogerty*: "frivolousness, motivation, objective

unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Virgin Records*, 512 F.3d at 726 (quoting *Fogerty*, 510 U.S. at 534 n.19); *see also Creations Unlimited*, 112 F.3d at 817. This list is not exhaustive.

If the court determines that the prevailing party is to receive fees, the court must calculate a "lodestar," the reasonable number of hours expended on successful claims multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (cited with approval in *Fogerty*, 510 U.S. at 534, as relevant to awarding attorneys' fees in copyright cases); *see also Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 578 (5th Cir. 2003); *Cynthia Hunt Prods. v. Evolution of Fitness Houston*, No. 07-0170, 2007 WL 3047220 at *2 (S.D. Tex. Oct. 18, 2007). The court may adjust this lodestar up or down based on what is "reasonable under the circumstances" of the specific case. *Lieb v. Topstone Indus.*, 788 F.2d 151, 156 (3d Cir. 1986); *Cynthia Hunt*, 2007 WL 3047220, at *3. In this final adjustment, the most important factor is the "degree of success obtained" by the prevailing party. *Hensley*, 461 U.S. at 436. Four other grounds for adjusting the lodestar may apply in copyright cases: the relative complexity of the litigation; the relative financial strength of the parties; the damages awarded; and whether the losing party acted in bad faith. *Lieb*, 788 F.2d at 156. As with all fee petitions, the moving party has the burden of demonstrating

that its fee request is reasonable. *Hensley*, 461 U.S. at 437; *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990).

B. Analysis

1. The Defendants are Entitled to an Award of Attorneys' Fees

The parties dispute whether an attorneys' fee award is appropriate in this case. The defendants contend that all four *Fogerty* factors are present. They argue that the suit "was completely without merit and frivolous" and was objectively unreasonable, both legally and factually. The defendants note that Randolph's suit was dismissed under Rule 12(b)(6) for failure to state a claim. The defendants speculate that Randolph's motive in filing suit "could have been an attempt to coerce" the defendants, which include "major entertainment companies," into "offering her a settlement rather than enduring the nuisance of litigation." They argue that awarding fees to the defendants would deter similarly baseless lawsuits in the future. (Docket Entry No. 32 at 4-5). Randolph counters that her claims were neither frivolous nor objectively unreasonable and that "there is not a shred of evidence" in the record to support an inference of improper motive. She argues that the defendants are "financially successful entities" with no need for an award to pay their legal fees. (Docket Entry No. 41 at 5). Each of these arguments is considered below.

a. Frivolous or Objectively Unreasonable

The fact that a copyright claim is dismissed after a court conducts a side-by-side comparison of the works does not necessarily mean that the claim was frivolous or objectively unreasonable. There is a difference between a suit that is "without merit" and one that is "patently frivolous." *See Positive Black Talk*, 394 F.3d at 382 n.23. In *Creations Unlimited*, for example, the Fifth Circuit upheld the district court's refusal to award attorneys' fees to the defendant despite finding on summary judgment that the works in question "differed . . . in too many respects for a layman to conclude that the works were substantially similar." 112 F.3d at 816. The district court had concluded that the legal claim, "though ultimately not successful, was neither frivolous nor objectively unreasonable, either in its factual allegations or its legal undergirding." *Creations Unlimited, Inc. v. McCain*, 889 F. Supp. 952, 954 (S.D. Miss. 1995). In *Armour v. Knowles*, 2006 U.S. Dist. LEXIS 81366, at *4 (S.D. Tex. Nov. 7, 2006), the district court similarly concluded that although a side-by-side comparison of the works established that they were not substantially similar as a matter of law, the plaintiff's claims were not frivolous.

A claim is more likely to be found frivolous or objectively unreasonable, however, when the lack of similarity between the unsuccessful plaintiff's work and the allegedly infringing work are obvious. In *Mallery v. NBC Universal, Inc.*, No. 08-0655, 2009

WL 1532494, at *2 (2d Cir. June 3, 2009), for example, the Second Circuit upheld an award of attorneys' fees to the defendant because "[t]he district court properly concluded that Plaintiffs' claims were objectively unreasonable" – "the profound dissimilarity between the [plaintiffs' documentary-style] works and the [television show] Heroes was indeed obvious." The Eighth Circuit similarly upheld a fee award to the defendants on the basis of the plaintiff's "objectively unreasonable" claim where there was clearly no substantial similarity between the two works. *Bar-Meir v. N. Am. Die Casting Ass'n*, 53 F. App'x 396, 2002 WL 31834811, at *1 (8th Cir. Dec. 19, 2002). In *Coles v. Wonder*, 283 F.3d 798, 803 (6th Cir. 2002), the Sixth Circuit upheld the district court's award of attorneys' fees to the defendant, affirming the district court's conclusion that the plaintiffs' claims were objectively unreasonable because the legal issues were clear and there was no case law from any circuit that supported the plaintiffs' position. In *Chivalry Film Products v. NBC Universal, Inc.*, No. 05 Civ. 5627, 2007 WL 4190793, at *1 (S.D.N.Y. Nov. 27, 2007), the court concluded that an award of attorneys' fees was appropriate because the plaintiff's claim that the defendants' movie infringed his book was objectively unreasonable. The court observed that "the works at issue could not be more different in 'total concept and feel,'" and the plaintiff's "attempts to show similarity between the works involve[d] the most trivial and generic of incidents." *Id.*

As in *Mallery*, there is an obvious and "profound dissimilarity" between *Mystic Deja* and *The Adventures of Shark Boy and Lava Girl*. 2009 WL 1532494, at *2.[2] The issues of fact and law that Randolph's claims presented were neither complex nor close. The specific points of similarity that Randolph identified, such as a flying bike or a dream journal, involve elements that, as a matter of settled law, are not copyrightable. Randolph's claims of substantial similarity, if not frivolous, were objectively unreasonable. These factors weigh in favor of awarding attorneys' fees to the defendants.

b. Motivation

The defendants speculate that Randolph may have sued because the defendants are "financially successful entities," while Randolph is an "individual author" whose novel was sold through "a self-publishing company of the sort typically used for low-volume book sales." (Docket Entry No. 32 at 3). The defendants do not offer evidence to support this speculation, relying instead on inference. "[T]he utter

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[2] The defendants also claim that Randolph presented specific similarities between the novel and the movie that were "factually wrong" (for example, that there was a character named "Dark Reign" in the movie when there was not). (Docket Entry No. 32 at 5). Randolph a responds convincingly that none of these constituted intentional misrepresentations of fact but were either attorney error or were disputed factual issues. (Docket Entry No. 41 at 3-4). Randolph's claims were not factually unreasonable.

lack of any substantial similarity between Plaintiff's novel and Defendants' movie makes it very difficult to imagine any proper motivation." (*Id.*). The defendants' argument does not show bad faith. The cases that find a bad-faith basis for filing a copyright infringement suit involve some direct evidence of improper motive that is lacking here. In *Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351, 357 (S.D.N.Y. 2006), for example, the court found that the plaintiff had acted in bad faith because the defendant had stopped selling the allegedly infringing product as soon as the plaintiff complained; the plaintiff had rejected a settlement offer through which the plaintiff could have recouped all of the defendant's profits on the product; and a letter from the plaintiff's agent to the plaintiff's attorney produced in discovery revealed that the plaintiff thought the case was "great" because it involved "a lot of STUPID, obstinate, deep pocketed, WILLFUL INFRINGERS." In *Lil' Joe Wein Music, Inc. v. Jackson*, No. 06-20079, 2008 WL 2688117, at *6 (S.D. Fla. 2008), the district court declined to make an explicit finding of bad faith but concluded that the defendants' uncontroverted allegations that plaintiff's counsel "repeatedly stated during the litigation that if Defendant's album had not done well, the suit would not have been brought" weighed in favor of a fee award.

The defendants have cited no case, and this court has located none, that infers an improper motive or bad faith simply because a plaintiff makes an objectively unreasonable infringement claim against

deep-pocket defendants. Some evidence of bad faith must be shown. *Cf. Armour*, 2006 U.S. Dist. LEXIS 81366, at *4 (declining to find improper motivation because "[t]he Court believes that Plaintiff was and continues to be sincere in her mistaken belief that her song and Beyonce's song sound alike"). This factor does not weigh in favor of an award of attorneys' fees in this case.

c. Compensation and Deterrence

The defendants argue that a fee award is appropriate because it would deter further baseless actions by Randolph, who moved for reconsideration after this court dismissed her claims with prejudice. (Docket Entry No. 45 at 6). The defendants also contend that a fee award would "send a clear message to other would-be plaintiffs that it is not acceptable to file meritless lawsuits against large companies," which would cause "[o]ther potential plaintiffs [to] think twice before filing such lawsuits if they knew that they could eventually be responsible for paying the defendants' attorneys' fees." (Docket Entry No. 32 at 6). The defendants argue that their ability to pay their legal fees without an award is irrelevant. "Financially successful companies should not be penalized by being exempted from the general rule" of awarding attorneys' fees. (Docket Entry No. 45 at 5). Randolph counters that the defendants' lack of need for a fee award, combined with the chilling effect of a fee award that could "scare off meritorious claims by

future plaintiffs, weighs against awarding attorneys' fees. (Docket Entry No. 41 at 5).

A prevailing party in a copyright case does not forfeit the ability to obtain a fee award because it is wealthy. A losing party who files an objectively unreasonable infringement case is not exempt from having to pay a fee award based on limited means. *See, e.g., Microsoft Corp. v. Software Wholesale Club, Inc.*, 129 F. Supp. 2d 995, 1012 (S.D. Tex. 2000). But as the Seventh Circuit has explained, the *Fogerty* rule of "evenhandedness" in awarding fees in copyright infringement cases – in particular, the compensation factor – was intended to promote the Copyright Act by ensuring that parties with limited resources could afford to prosecute or defend against opponents with plentiful resources. *See Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 436 (7th Cir. 2004). The Seventh Circuit observed that "unlike civil rights suits, where while a prevailing plaintiff is presumptively entitled to an award of fees, a prevailing defendant is entitled to such an award only if the suit was groundless . . . in copyright suits 'prevailing plaintiffs and prevailing defendants are to be treated alike.'" *Id.* (quoting *Fogerty*, 510 U.S. at 534). The court reasoned that the parties are treated differently in civil rights suits because such suits nearly always involve "a little guy suing a big guy." *Id.* By contrast, "[e]ntities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists; the same is true of prospective copyright infringement defendants." *Fogerty*, 510

U.S. at 524 (quoting *Cohen v. Virginia Elec. & Power Co.*, 617 F. Supp. 619, 621 (E.D. Va. 1985)). The considerations of evenhandedness and compensation are directed to giving the "little guy" the financial opportunity to vindicate her rights. *Assessment Techs.*, 361 F.3d at 436; *cf. Armour*, 2006 U.S. Dist. LEXIS 81366, at *4 (noting, in a suit by an individual songwriter against the established artist Beyonce and various music-publishing companies, that "[t]here [was] no particular need . . . for compensation to Beyonce and the other defendants").

The need for deterrence, however, weighs in favor of a fee award to the defendants. The cases show that when a copyright infringement claim is objectively unreasonable, deterrence is an important factor. As one court explained:

> [T]he need for deterrence against objectively unreasonable copyright claims is significant. Just as attorney fee awards may chill litigation of *close* cases, preventing the clear demarcation of the boundaries of copyright law, the denial of such awards in *objectively unreasonable* cases also disserves the purposes of copyright law, by failing to protect the owners of valid copyrights from the cost of frivolous litigation. Furthermore, the denial of fees and costs to a prevailing defendant in an objectively unreasonable copyright case may spur additional frivolous lawsuits, of exactly the sort that an award of fees and costs is designed to "chill."

Chivalry Film Prods., 2007 WL 4190793, at *3 (citations omitted). "Consistent with furthering the purposes of the Copyright Act . . . a party that presents only objectively unreasonable claims or defenses should not be encouraged in such conduct and, in fact, should pay the attorney's fees associated with the prevailing party's resulting necessary prosecution or defense." *Luken v. Int'l Yacht Council, Ltd.*, 581 F. Supp. 2d 1226, 1246 (S.D. Fla. 2008) (citations omitted); *see also Gen. Universal Sys.*, 379 F.3d at 159 (affirming fee award where plaintiff filed new suit against different defendants raising same copyright issues rejected as a matter of law on summary judgment); *Bridgeport Music, Inc. v. WB Music Corp.*, 520 F.3d 588, 593 (6th Cir. 2008) (upholding attorneys' fees because the plaintiff had pursued its claim even after the entry of judgment in a related case with preclusive effect made the plaintiff's claim "patently futile"); *Bar-Meir*, 2002 WL 31834811, at *1 (affirming fee award based on the district court's "finding that the action was objectively unreasonable and there was a need to deter future similar suits"); *Earth Flag Ltd. v. Alamo Flag Co.*, 154 F. Supp. 2d 663, 668 (S.D.N.Y. 2001) (An award of attorneys' fees will "beneficially deter, rather than excessively chill future lawsuits.").

Randolph's copyright infringement claims were objectively unreasonable. The need for deterrence supports an award of attorneys' fees to the defendants. The need for compensation does not.

d. Balancing the Factors

The conclusion that Randolph's claim was objectively unreasonable is entitled to "substantial weight in determinations whether to award attorneys' fees." *Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116, 121 (2d Cir. 2001); *see also Creations Unlimited*, 112 F.3d at 817; *Positive Black Talk, Inc.*, 394 F.3d at 382-83; *Virgin Records*, 512 F.3d at 727 (all upholding decisions that denied fee awards only after finding that the plaintiff's claims were not objectively unreasonable); *Budget Cinema, Inc. v. Watertower Assocs.*, 81 F.3d 729, 733 (7th Cir. 1996) (holding that "the district court abused its discretion by failing to award attorney's fees based on the objective unreasonableness of [plaintiff's] complaint"); *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 890 (9th Cir. 1996) (awarding fees in part because plaintiff's claims were "factually unreasonable"); *Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503, 506 (4th Cir. 1994) ("[T]he objective reasonableness factor strongly weighs in favor of awarding attorney's fees and costs."). Because Randolph's claims were objectively unreasonable, the deterrence factor provides an additional basis for awarding fees to the defendants. Although the evidence does not support an inference that Randolph brought her action in bad faith or with an improper motive, the totality of the factors set out in *Fogerty* weigh in favor of a fee award.

2. The Lodestar Calculation

a. The Hourly Rate

The first step in computing the lodestar is determining a reasonable hourly rate. *See Hensley*, 461 U.S. at 433. The prevailing market rate for similar services by similarly trained and experienced lawyers in the relevant legal community is the established basis for determining a reasonable hourly rate. *Tollett v. City of Kemah*, 285 F.3d 357, 368 (5th Cir. 2002). The party seeking fees bears the burden of establishing the market rate and should present the court with evidence from which the court can determine the reasonableness of the proposed rate. *Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th Cir. 1996).

The defendants were represented by the firm Locke Lord Bissell & Liddell LLP. One partner, two associate attorneys, and one paralegal staffed the case. The partner, Roy Hardin, has submitted an affidavit stating that the focus of his practice is intellectual property litigation, he is familiar with the usual and customary fees charged in this type of action, and "[t]he attorney's fees and costs incurred in this case are reflective of the types of activity normally engaged in by counsel charged with developing a defens[e] and preparing a motion to dismiss the frivolous claims brought by Randolph." (Docket Entry No. 32, Ex. A at 3). Hardin's rate was $510 per hour. The two associates were billed at $300 and $220 per hour, and the legal assistant at $170 per hour. Randolph does not challenge the reasonableness of these

rates. This court takes judicial notice of the Texas State Bar's "Hourly Rates in 2005 Report," the most recent such report. This report states that the median hourly rate for intellectual property attorneys in Texas was then $350 per hour and a high rate was $700 per hour.[1] The hourly rates submitted by Locke Lord are consistent with prevailing Houston market rates for intellectual property attorneys and are reasonable.

b. The Number of Hours Reasonably Expended

A fee application should include "contemporaneously created time records that specify, for each attorney, the date, the hours expended, and the nature of the work done." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998). "Hours that are excessive, redundant, or otherwise unnecessary" are to be excluded, and in dealing with such surplusage, the court has discretion simply to deduct a reasonable percentage of the number of hours claimed as a practical means of trimming fat from a fee application. *Hensley*, 461 U.S. at 433-34 (internal quotations and citations omitted). The court may also exclude

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[1] *See* Texas State Bar, Dep't of Research & Analysis, *Hourly Rates in 2005 Report* at 14 (Sept. 21, 2006), *available at* http://www.texasbar.com/Template.cfm?Section=Research_and_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15888 (last visited June 26, 2009).

hours from the lodestar calculation that were not properly documented. *See id.*

Hardin's affidavit attaches two invoices for legal services that Locke Lord billed to the defendants for work in this case. The defendants are seeking compensation for all entries in these invoices. The first entry is for November 10, 2008, the date the complaint was filed. The last entry is for January 31, 2009, the date the defendants filed the reply to the motion to dismiss. The defendants are not seeking attorneys' fees for the services that Locke Lord provided after January 31, 2009, which included responding to the motion for reconsideration and filing the fee application. The invoices show that the defendants' attorneys spent 131 hours on this case between November 10, 2008 and January 31, 2009. The large majority of this work was done by one of the associates, who billed 126.25 hours at $300 per hour.

A summary of the time billed by the defendants is set out below:

Task	Hours	Rate	Amount
Background research	9.5	$300	$2,850.00
Activities relating to Fireman's Fund	6.5	$300	$1,950.00
Researching and drafting the Answer	20.5	$300	$6,150.00
	2.75	$220	$605.00
Preparing the Joint Discovery and Case Management Plan	10.75	$300	$3,225.00

Researching, drafting, and filing the Motion to Dismiss	1.25	$510	$637.50
	29.75	$300	$8,925.00
	0.25	$170	$42.50
Researching, drafting, and filing the Reply to the Motion to Dismiss	37	$300	$11,100.00
Court appearances	8.5	$300	$2,550.00
Entries too redacted to classify	0.5	$510	$255.00
	3.75	$300	$1125.00
Sub-Totals	1.75	$510	$892.50
	126.25	$300	$37,875.00
	2.75	$220	$605.00
	0.25	$170	$42.50
Grand Total	131		$39,415.00

Locke Lord's bills provided a 10.5% discount on the total fees, reducing the total to $35,276.43. The defendants seek this reduced amount.

Randolph argues that the $35,276.43 sought is unreasonable in several respects. First, Randolph argues that the defendants have not segregated time spent defending against the copyright claim, for which they seek fees, from time spent defending against the Lanham Act and Texas Deceptive Trade Practices Act (DTPA) claims, for which they do not. (Docket Entry No. 41 at 5-6). The Lanham Act, unlike the Copyright Act, only permits fee awards in "exceptional cases," such as those involving bad faith. *See* 15 U.S.C. § 1117; *Motown Prods., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 786 (2d Cir. 1988). A similarly strict standard applies to fee awards to defendants under the DTPA. TEX. BUS. & COM. CODE § 17.50(c);

Barkhausen v. Craycom, Inc., 178 S.W.3d 413, 421 (Tex. App. – Houston 2005, writ denied). The defendants do not contend that a fee award for their Lanham Act or DTPA claims is appropriate. Instead, the defendants argue that segregation is not required because "this entire lawsuit fundamentally arises from Plaintiff's claim of copyright infringement." (Docket Entry No. 45 at 1).

Segregation of hours spent on different claims is not required when the claims are "so intertwined that it is impossible to differentiate" between them. *See Gracie v. Gracie*, 217 F.3d 1060, 1069-1070 (9th Cir. 2000) (requiring the district court to apportion fees between Lanham Act claims and non-Lanham Act claims unless the claims "are so intertwined that it is impossible to differentiate" between them). Randolph's trademark and DTPA claims were closely intertwined with her copyright claims. This court dismissed Randolph's trademark claim because her argument was not that "the defendants offered for sale tangible goods that she produced, but that they copied from a book that she wrote in creating the movie." (Docket No. 30 at 12). This court dismissed Randolph's DTPA claim because it alleged no facts that could support recovery of damages "based on claims 'different in kind' from the wrongful use of her copyrighted book." (*Id.*). There was a significant overlap between the work required to defend against these claims and the work required to defend against the copyright claim, which makes segregation difficult. But the defendants likely spent some time on

these claims that did not overlap with the copyright infringement claims – time spent, for example, researching the elements of the claims and drafting the portions of the motion to dismiss that addressed them. A reduction of three hours of the associate's time at $300 per hour is appropriate.

Randolph also argues that the defendants are improperly seeking fees for the 6.5 hours spent seeking coverage from their insurer, Fireman's Fund, for legal expenses. This time included corresponding with the insurer and drafting and finalizing an "Initial Strategy, Plan, and Budget" for the insurer. Randolph contends that this time was "not reasonably incurred in connection with the defense of [the] copyright claim." (Docket Entry No. 41 at 6). The case law supports Randolph's position. *See, e.g., Baza v. Chevron Oil Serv. Co.*, No. 95-1574, 1996 WL 711506, at *3 (E.D. La. Dec. 10, 1996) (excluding hours spent pursuing insurance coverage for claim because "there is neither a 'common core of facts' nor any 'related legal theories' between Chevron's claim for insurance coverage and its defense of the main action"); Baseball at *Trotwood, LLC v. Dayton Professional Baseball Club, LLC,* 493 F. Supp. 2d 972, 985 (S.D. Ohio 2005) (declining to award attorneys' fees for time spent seeking coverage from insurance carrier because this was not time advanced in support of the successful claim). A reduction of 6.5 hours of the associate's time at $300 per hour is appropriate.

An award is inappropriate for the 23.25 hours that the defendants spent researching, drafting, and

preparing to file an answer to Randolph's complaint. This answer was never filed. Instead, the defendants filed a motion to dismiss under Rule 12(b)(6). The defendants do not contend that any of the work done on the answer was later applied to the motion to dismiss. The work done on the answer was not reasonably incurred in connection with the defendants' successful defense of the copyright claim. A reduction of 20.50 hours of time at $300 per hour and of 2.75 hours at $220 per hour is appropriate.

Finally, the time shown in heavily redacted portions of the billing records is deducted from the lodestar. Redaction of billing records is acceptable so long as the court has sufficient information to form an opinion on the reasonableness of the fees. *See Vantage Trailers, Inc. v. Beall Corp.*, No. 06-3008, 2008 WL 4093691, *3 n. 2 (S.D. Tex. Aug. 28, 2008). Redacted entries must be excluded if they do not provide sufficient information to classify and evaluate the activities and hours expended. Some of the defendants' entries fall into this category. The December 1, 2008 entry for "E-mail correspondence," for example, does not identify the subject of the emails or otherwise provide sufficient information to assess whether the time expended was reasonable in defending against Randolph's copyright claim. A review of the records revealed 4.25 hours billed in entries too heavily redacted to provide adequate information. A reduction of 0.5 hours at $510 per hour and 3.75 hours at $300 per hour is appropriate.

Totaling all of the above reductions, Hardin's hours for purposes of calculating the lodestar are reduced by 0.5, from 1.75 to 1.25 at $510 per hour. The associate's hours billed at $300 per hour are reduced by 33.75 hours, from 126.25 to 92.5. The associate's hours billed at $220 per hour are reduced by 2.75 hours, yielding a total of zero. The legal assistant's hours are unchanged. Hardin's 1.25 hours multiplied by his $510 hourly rate yields $637.50. The 92.5 hours multiplied by the $300 hourly rate yields $27,750; the 0.25 hours multiplied by the $170 hourly rate yields $42.50. These numbers total $28,430. Applying the 10.5% reduction contained in the invoices, the lodestar is $25,444.85.

3. Adjustments to the Lodestar

A court may adjust the lodestar to reflect what is "reasonable under the circumstances" of the specific case. *Lieb*, 788 F.2d at 156; *Cynthia Hunt*, 2007 WL 3047220, at *3. The factor of the "degree of success obtained" by the prevailing party, *Hensley*, 461 U.S. at 436, weighs in favor of no reduction. The defendants in this case succeeded in early dismissal. But this court should also examine the relative complexity of the litigation; the relative financial strength of the parties; the damages awarded; and whether the losing party acted in bad faith. *Lieb*, 788 F.2d at 156.

The first two of these factors – complexity and the relative financial strength of the parties – support downward adjustment. Randolph's copyright claim

was neither novel nor complex. *See, e.g., Williams v. Crichton*, 891 F. Supp. 120, 121-22 (S.D.N.Y. 1994) (copyright claim of substantial similarity between a book and movie was not novel or complex where "[t]hese similarities . . . all flow[ed] from the concededly uncopyrightable concept of a dinosaur zoo"). And the defendants emphasized Randolph's comparative financial weakness in their attorneys' fee briefing, speculating that Randolph may have been motivated to bring this suit against the "financially successful" defendants because of the "limited commercial success" of her own book and suggesting that Randolph may have hoped that the nuisance value of the suit would "coerce the Defendants into offering her a settlement." (Docket Entry No. 32 at 3-4).

In *Bridgmon v. Array Systems Corp.*, 325 F.3d at 578, the Fifth Circuit upheld the district court's decision to reduce the lodestar in a copyright action by approximately 70%, from $177,507 to $50,000. The Fifth Circuit noted that summary judgment had been "readily granted." The court did not address whether there was any disparity in the financial strength of the parties. In *Douglas v. Osteen*, No. 08-3097, 2009 WL 641218, at *3 (3d Cir. Mar. 13, 2009), the Third Circuit upheld an award in a copyright action of $5,000, on a total of $75,000 sought, almost a 95% reduction. The district court had reasoned that this amount accommodated the plaintiff's *pro se* status while serving as a sufficient deterrent against the plaintiff's tendency toward bad-faith litigation conduct. *See* Order, *Douglas v. Osteen*, No. 07-3925, (E.D.

Pa. June 12, 2008). In *Polsby v. St. Martin's Press, Inc.*, No. 97 Civ. 690, 2001 WL 180124, at *1 (S.D.N.Y. Feb. 22, 2001), the court reduced the requested fee amount by almost 90% in order to "take into account the financial circumstances of the plaintiff," who had a "modest income" and liability for back taxes, but who "d[id] have some earning power as the result of her [medical] degree." In *Williams v. Crichton*, No. 93 Civ. 6829, 1995 WL 449068, at *1 (S.D.N.Y. July 26, 1995), the court concluded after dismissing the plaintiff's claims of substantial similarity on summary judgment that "the relative financial strength of the parties [wa]s so disproportionate" that "the purposes of the Copyright Act [would] be served by a relatively small award." The court did not indicate the amount of fees that the defendants sought. The court, although "fully recognizing the thorough and professional work done on this case by defendants' counsel," awarded only $3,000 total in fees and costs. *Id.*

A reduction to the lodestar would promote the purpose of the Copyright Act and the disproportionate financial positions of the parties, while recognizing that the plaintiffs' claims were objectively unreasonable and the work by defendants' counsel was both professional and appropriate. *See, e.g., Lieb*, 788 F.2d at 156; *Williams v. Crichton*, No. 93 Civ. 6829, 1995 WL 449068, at *1. The litigation was not novel or complex, and this court disposed of Randolph's claims early by granting the defendants' Rule 12(b)(6) motion to dismiss. The defendants have emphasized the disparity in the parties' financial positions. But

Randolph was not *pro se*; she has been represented by counsel. A reduction to the lodestar of 85% is appropriate. Randolph must pay $3,816.73 in attorneys' fees to the defendants.

C. Costs

Finally, the defendants seek $1,288.72 in costs under Federal Rule of Civil Procedure 54(d). Rule 54(d)(1) provides, in relevant part, that "[u]nless a federal statute, these rules or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." There is a strong presumption under Rule 54(d)(1) that the prevailing party will be awarded costs. *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 586 (5th Cir. 2006). In addition, Section 505 of the Copyright Act provides: "In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof." 17 U.S.C. § 505.

Randolph does not challenge the amount of costs claimed and there does not appear to be a basis for doing so. These costs were reasonably incurred and are compensable under the Rules of Federal Procedure and the Copyright Act. Randolph is ordered to pay $1,288.27 in costs to the defendants.

III. Conclusion

Randolph's motion for reconsideration is denied. The defendants are awarded $3,816.73 in attorneys' fees and $1,288.27 in costs.

SIGNED on June 29, 2009, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge